Phelps Dodge Mining Company, Tyrone Branch *and* United Steelworkers of America, AFL–CIO, CLC *and* Transport, Local Delivery and Sales Drivers, Warehousemen and Helpers, Mining, Motion Picture and Television Production, State of Arizona, Local Union No. 104, an affiliate of International Brotherhood of Teamsters, AFL–CIO[1] *and* International Union of Operating Engineers, Local No. 953, AFL–CIO

Phelps Dodge Rod Mill, El Paso Plant *and* International Brotherhood of Electrical Workers, Local Union 583, AFL–CIO. Cases 28–CA–10436, 28–CA–10499, 28–CA–10506, and 28–CA–10517

September 24, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On November 20, 1991, Administrative Law Judge Timothy D. Nelson issued the attached decision. The Respondent filed exceptions and a supporting brief. The United Steelworkers of America, AFL–CIO, CLC filed an answering brief to which the Respondent filed a reply brief[2] and a motion to reopen the record to receive further evidence. The General Counsel, the Steelworkers, and Operating Engineers, Local No. 953, AFL–CIO each filed an opposition to the motion to reopen to which the Respondent filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order.

The Respondent excepts, inter alia, to the judge's finding that its initiation of a quarterly appreciation program limited to unrepresented employees violated Section 8(a)(1) and (3) of the Act. The Respondent argues that the judge's finding in this regard was premised on an erroneous factual finding that the Respondent, on March 26, 1990, had transmitted to all its unrepresented employees a letter that was headed with a salutation ''To: All Union Free Day's-Pay Employees.'' In its motion to reopen the record, the Respondent proffers evidence that the letter with that salutation was sent only to employees of one of the involved facilities. It argues that the Board should, on the basis of this evidence, reverse the judge's finding that the program was discriminatory.

We disagree. Even assuming arguendo that we should receive and consider the proffered evidence[4] and accept the proposition that letters with the ''union-free'' heading were not sent to all unrepresented employees, we see no reason to reverse the judge's ultimate finding that the program was unlawful. It is undisputed that all such employees received, by April 15, 1990, along with their first program check, a letter and payments table from their local managers, and that each of these documents explicitly referred to the program as for ''union-free'' employees only. This evidence clearly supports the judge's 8(a)(1) and (3) findings.[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Phelps Dodge Corporation, El Paso, Texas, and Tyrone, New Mexico, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

---

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We correct two inadvertent errors of the judge. First, in the third paragraph of sec. I of his decision, the judge incorrectly referred to the Respondent's director of employee relations, Stuart L. Marcus, as ''Stephen'' Marcus. Second, in sec. VI of his decision, the judge incorrectly designated the discussion entitled ''Section 8(a)(5) Unilateral Change'' as ''B.'' It should be ''C.''

In affirming the judge's finding that the Respondent's unilateral change in appreciation payments violated Sec. 8(a)(5), we do not rely on the Respondent's failure to raise the issue of waiver in its answer to the complaint. See sec. VI,C,4 of the judge's decision. In further regard to that finding, we find no merit in the Respondent's reliance on *Benchmark Industries*, 270 NLRB 22 (1984). Here the ''appreciation payments'' given employees from 1985 to 1989 were more than token ''gifts.'' They constituted significant economic benefits to eligible employees based on the employment-related factors of wages and hours worked. See sec. VI,C,2 of the judge's decision.

[4] We deny the motion to reopen the record to receive further evidence. Even under Sec. 102.48(b) of the Board's Rules and Regulations, which the Respondent argues is the applicable rule for determining the propriety of its motion, the Board has discretion to refuse to accept motions that seek to introduce evidence which would have been available for introduction during the trial. Rule 102.48(b) is not carte blanche for remedying omissions in a party's trial of the case. As explained below, however, it is immaterial whether we should allow the Respondent to revise the testimony of its own allegedly ''confused'' witness by means of posttrial affidavits, because even if allowed, the revised record would make no difference in the outcome.

[5] In agreeing that the Respondent violated Sec. 8(a)(3), Member Oviatt would not infer animus from the mere fact that an employer confers benefits on employees that it does not wish to become a practice that is binding on the employer. Further, Member Oviatt agrees that the Respondent's ''1990 Union-Free'' program violated Sec. 8(a)(3), but he finds it unnecessary to adopt the judge's linguistic analysis in sec. VI,B,3 of his decision.

Lewis S. Harris, Esq., for the General Counsel.
Stuart Newman and *Jay D. Milone, Esqs. (Jackson, Lewis, Schnitzler & Krupman)*, of Atlanta, Georgia, for Respondent Phelps Dodge Corporation.
Gerald Barrett, Esq. (Ward, Keenan & Barrett), of Phoenix, Arizona, for Charging Parties Steelworkers and Teamsters Local 104.
John L. Hollis, Esq. (Kool, Kool & Hollis), of Albuquerque, New Mexico, for Charging Party Operating Engineers Local 953.
Hector F. Arellano, Business Manager, of El Paso, Texas, for Charging Party Electrical Workers Local 583.

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. The labor organizations named in the case caption[1] (collectively, the Unions) filed unfair labor practice charges with the Regional Director for Region 28 at various times from July 25 through September 4, 1990, against certain operations of the Phelps Dodge Corporation, the Respondent.[2] On October 12, 1990, acting for the Board's General Counsel, the Regional Director issued separate but commonly focused complaints against the Respondent's two operations identified in the case caption,[3] and a further order consolidating these cases for trial. The Respondent filed answers to the separate complaints, admitting that the Board's jurisdiction was properly invoked, but denying all wrongdoing. I conducted the trial of the cases in El Paso, Texas, on December 18 and 19, 1990, where all parties appeared through attorneys or other representatives.

In the complaints, the General Counsel commonly attacks the Respondent's admitted announcement and implementation in March–April 1990, of a quarterly ''program'' of ''appreciation payments, '' or bonuses, for its ''union-free''[4] employees only. The complaints focus on the impact of this program on certain union-represented employees who work in established collective-bargaining units at the Respondent's Tyrone, New Mexico Mine and at its El Paso, Texas Rod Mill. They aver that this program constituted a material ''change'' from a historical ''practice'' of including those Tyrone and El Paso unit employees in previous bonus payments of like kind, more specifically, that,

> From . . . October 3, 1985 to . . . August 11, 1989, the Respondent maintained a practice of granting periodic bonus payments equally to employees in the [Tyrone and El Paso bargaining units] and to those employees who were [also] employed at [Tyrone and El Paso] who were unrepresented . . . by any . . . labor organization.

Consistent with the complaints, the General Counsel contends that when the Respondent excluded the Tyrone and El Paso bargaining unit employees from payments made to their ''union-free'' coworkers under the new program, (a) it discriminated based on their union-represented status against the former groups, and thereby violated Section 8(a)(3), and, independently, Section 8(a)(1) of the Act; and (b) it committed a unilateral, midcontract, change in established appreciation payment practices affecting employees in the Tyrone and El Paso bargaining units, and thereby violated Section 8(a)(5) and Section 8(d).

In its answers, the Respondent denied key factual allegations and all conclusionary allegations of wrongdoing. Significantly absent from its answers, however, are any affirmative defenses. Nevertheless, in its arguments on brief, the Respondent takes the following positions of fact and law.

Concerning the 8(a)(3) and (1) counts, the Respondent denies that its planning or execution of the 1990 program was influenced by any union-hostile considerations, or that its actions had any inherent tendency to interfere with employee rights under the Act. The Respondent claims instead that it was acting for purely ''business'' reasons—merely exercising an employer's right under the Act to devise and implement compensation programs on a unilateral basis which are limited exclusively to those of its employees who have no union to bargain for them.

As to the 8(a)(5) counts, the Respondent denies that it followed any such past ''practices'' respecting appreciation payments in the 1985–1989 period as are commonly alleged in the complaints. Relatedly, it denies that it ever owed a duty to bargain with any of the Unions concerning any of the appreciation payments which it admittedly *did* make to union-represented employees in the 1985–1989 period. The Respondent now urges that those 1985–1989 payments were ''discretionary gifts,'' and that, unlike the payments made under the 1990 program for ''union-free'' employees, the 1985–1989 payments were not paid as part of any ''compensation program,'' and, therefore, that each successive ''gift'' never became a mandatory subject for bargaining with the Unions.[5] Moreover, the Respondent denies that its

[1] The individual Charging Party Unions will be called, in their order of appearance in the case caption, the Steelworkers, the Teamsters, the Operating Engineers, and the Electrical Workers.

[2] At the trial's outset the parties entered into a written stipulation of facts. In that stipulation the parties variously acknowledged that the names of respondent entities in the case caption of the complaint do not strictly match the actual corporate form and style of those entities. In fact, as is acknowledged in the opening remarks of the Respondent's counsel, the named entities are corporate subsidiaries of the Phelps Dodge Corporation. The record elsewhere shows that officials of the Phelps Dodge Corporation establish all wage and benefit levels and other policies and programs affecting the employer-employee relationship at each of those subsidiary locations. Indeed, the actions challenged by the complaint (the Respondent's unilateral inauguration in March–April 1990 of a formal, regularized bonus plan for ''union-free'' employees only) were entirely conceived and directed by the Respondent's corporate president, working with the top corporate labor relations official. Accordingly, consistent with the colloquy at the beginning of the trial, I will treat the Phelps Dodge Corporation itself as the pertinent respondent entity.

[3] One of these was a consolidated complaint in Cases 28–CA–10436, 28–CA–10499, and 28–CA–10506; the other was a separate complaint in Case 28–CA–10517.

[4] When the Respondent writes this expression, it does not use a hyphen between ''union'' and ''free,'' even though it admittedly intends by the expression to refer a state of ''freedom'' *from* ''union'' representation. When I adopt this expression for various purposes below, I will divide those words by a hyphen as a matter of stylistic preference.

[5] In addition, for the first time on brief, the Respondent affirmatively claims that the Electrical Workers, at least, have ''waived'' any bargaining rights they may have otherwise enjoyed with respect

1990 program may be understood as involving a ''change'' from any previous ''practice''; instead, the Respondent insists repeatedly that ''The Formal [1990] Program is *wholly unrelated* to the prior [1985–1989] payments.''[6]

I have studied the whole record, and all arguments and authorities advanced by the parties in their posttrial briefs.[7] I have considered the demeanor of the witnesses as they testified, and have made assessments of the probabilities in the light of the undisputed surrounding circumstances. Based on all that, and more particularly on the following findings and reasoning, I will conclude that the Respondent committed violations substantially as alleged in the complaints.

Findings and Conclusions

The litigation of these cases has yielded a rather large reservoir of stipulated facts and undisputed testimonial and documentary evidence from which all parties now draw to nourish their respective legal arguments. With one exception, the parties do not disagree about the historical facts;[8] rather, they disagree about which are worth mentioning or about how to characterize or interpret them. In these findings I shall attempt to integrate most of the facts cited by one party or another to support one position or another. In the process, I will make some preliminary observations relevant to my concluding analyses.

I. CENTRAL FACTS IN SUMMARY

Starting in October 1985, and at calculatedly irregular intervals after that, through August 1989, the Respondent gave a total of eight ''appreciation'' payments to its ''day's-pay'' (hourly paid) employees working at copper mining or processing facilities managed by its mining company subsidiary.[9] One of these was a special payment to employees at a single operation, the El Paso Refinery; the remaining seven payments were made to employees at most or all the various mining company operations. These were linked to the current overall profitability of the Respondent, in an industry where fluctuations in the market price of copper, or ''COMEX price,'' will often make the difference between profit and loss. Of these seven payments, five were made to day's-pay employees at all facilities, on a companywide basis; indeed, all of the four payments made after December 1987 were companywide in scope. The PACT union-represented day's-pay employees at the Respondent's Tyrone (New Mexico) Mine were included in all seven multifacility payments; the Electrical Workers-represented employees in the El Paso (Texas) Rod Mill bargaining unit were included in six of those seven payments.

Union representation or lack of representation had nothing to do with eligibility to receive any of these appreciation payments. In the minority of payments which were less than companywide in scope, the limitations were ''locational'' in nature; that is, if you were a day's-pay employee at an included location, you would receive the payment, without regard to your ''union'' status, and vice-versa. Put another way, union-represented employees always received these payments to the same extent and according to the same formula that the unrepresented day's-pay employees at the same location received them.[10]

In June 1989, an executive committee headed by the Respondent's president and chief operating executive, Leonard Judd, had deliberated over the amount and reach of what would prove to be the Company's eighth and last appreciation payment made on a ''union-blind'' basis (the August 1989 payment, distributed companywide). In this context, the committee had considered for the first time the possibility of excluding the roughly 450 employees in the PACT union bargaining unit at the Tyrone Mine from the planned payment. The Respondent's director of employee relations, Stephen Marcus, had suggested in this regard that,

> we could take the position that we will only provide that compensation required by the [PACT Union] contract and not provide an appreciation payment.

Rejecting this idea, the executives instead had adopted the alternative view proposed by Marcus—that there would be,

> little to gain from the anger that would be generated by not including Tyrone employees in the appreciation payment.

In March-April 1990, however, the Respondent unilaterally announced and implemented a 6-month retroactive appreciation payment only to those of its employees who were, in the Respondent's recently favored usage, ''union free.''[11] The Respondent did this as part of a formal ''supplemental compensation'' program, designed exclusively for such unrepresented workers. The Respondent called this the ''Phelps Dodge Mining Company Union Free Day's-Pay Quarterly Appreciation Payment Program.''[12]

---

to appreciation payments made to employees in the El Paso Rod Mill bargaining unit, and claims further that all the Unions independently ''waived'' any rights to bargain with the Respondent about including the employees they represented in the appreciation payments made under the new program by failing to make any demand to bargain after they became aware of the new program.

[6] Respondent's Br. at 19, 34 (my emphasis); see also (id. at 34) the topic caption, which virtually repeats this phrase yet a third time, with the only difference being that the word, ''totally'' is used in place of ''wholly.''

[7] All parties submitted briefs except Electrical Workers Local 583.

[8] The exception concerns a testimonial conflict between the Steelworkers' International representative, Robert Guadiana, and the Respondent's negotiator, Jack Ladd, concerning an alleged ''informal'' meeting between the two in early 1987. For reasons I discuss below, I will not find it necessary to resolve this conflict.

[9] In its public and internal communications, the Respondent has historically used the expression ''day's-pay'' employees, to refer to *all* the ''hourly'' workers within its copper operations, union-represented or not.

[10] I thus note at the outset that the complaints are literally accurate insofar as they commonly allege that in the 1985–1989 period, ''the Respondent maintained a practice of granting periodic bonus payments equally to employees in the [Tyrone and El Paso bargaining units] and to those employees who were [also] employed at [Tyrone and El Paso] who were unrepresented . . . by any . . . labor organization.''

[11] There is no dispute that this usage conspicuously emerged in corporate writings in March 1990, chiefly in announcement materials concerning the new quarterly appreciation payment program addressed to local ''Union Free'' employees and to their managers and supervisors. I relate further details in sec. VI.

[12] See G.C. Exh. 6, one of many internal memoranda about the program transmitted on or about March 23, 1990, by the Respond-

Continued

When Company President Judd announced the 1990 quarterly payment program in a letter to ''All Union[-]Free Employees,'' he referred to the earlier 1985–1989 history of appreciation payments, saying, among other things,

> Phelps Dodge is proud of the fact that we were the first company in the copper industry to provide our employees with appreciation payments. These payments have allowed us to share our good fortune during periods of high copper prices, while maintaining our competitiveness during periods of low copper prices. Since our first appreciation payment in 1985, the average employee has received over $6,000 in payments.
>
> All employees have welcomed the past appreciation payments, although there has been a concern that these payments have been difficult to predict.
>
> To address this issue, I am pleased to advise you that Phelps Dodge will be implementing a program of Quarterly Appreciation Payments linked to the COMEX price of copper.[13]

This new program definitionally and in practice excluded the union-represented Tyrone and El Paso day's-pay workers. From the point in April when the new program was implemented to the point when this litigation concluded some 8 months later, the Respondent had made a total of three quarterly payments to ''union-free'' day's-pay workers at the Tyrone Mine and the El Paso Rod Mill and, as well, to unrepresented employees at all other mining company facilities. Union-represented employees at Tyrone and El Paso received no such payments nor counterpart payments at any time during this same period.[14]

II. COMPANY OPERATIONS; KEY PERSONALITIES

The Respondent Phelps Dodge Corporation, headquartered in Phoenix, Arizona, employs nearly 10,000 persons worldwide. Our focus is on the Respondent's role as a major copper mining and processing company, which, through a first-level subsidiary corporation called ''Phelps Dodge Mining Company,'' currently owns and operates a total of eight facilities—mines, smelters, refineries, mills, or other processing plants—at five distinct locations in the United States. All but one of these (the Norwich, Connecticut Rod Mill) are located in the southwest.[15] At each of these operations the Respondent employs hourly paid (''day's-pay'') employees in production and maintenance or other blue-collar job classifications. As detailed below, employees at some of these operations are represented by unions, while at other facilities employees working in substantially similar job classification are unrepresented.

Leonard R. Judd is the Respondent's president and chief operating executive, positions he has held since May 1989, following his service in a series of other top executive jobs with the parent corporation over the previous 4 years.[16] He authorized and directed all the appreciation payments to mining company day's-pay employees made in the 1985–1989 period, and was responsible, as well, for authorizing and shaping the 1990 union-free quarterly appreciation payment program.

Stuart L. Marcus is the Respondent's director of employee relations, a position he assumed after joining the corporation in July 1988. In that capacity, he was responsible for assisting Judd in planning for all appreciation payments made after July 1988, and for implementing them. Subject to Judd's direction, supervision, and final approval, Marcus and his staff also did the relevant research and prepared the workups, option papers, and local publicity and information kits associated with the Respondent's planning for and announcing of the 1990 union-free program.

III. UNION-REPRESENTED AND ''UNION-FREE'' EMPLOYEE GROUP

The Respondent has historically recognized and entered into labor agreements with the Electrical Workers as the collective-bargaining representative of nearly all its hourly production and maintenance employees at its El Paso (Texas) Rod Mill.[17] At its Tyrone (New Mexico) Mine, at all times

---

ent's chief employee relations official, Marcus, to the managers at the affected operations.

[13] I observe at the outset that in this letter the Respondent's president plainly portrayed the new program as having been rooted in the 1985–1989 history of previous payments. Indeed, in the quoted passages the new program was depicted as being not merely thematically and substantively ''related'' to the 1985–1989 history of payments, but as being an *improvement upon* that ''proud'' tradition of payments which, however ''welcomed'' by the employees, were admittedly difficult for employees to ''predict.'' And this is only one of many examples of admissions made by the Respondent's top officials which make it ludicrous for the Respondent now to claim (as it does, repeatedly) that the 1990 program was ''wholly [or 'totally'] unrelated'' to the 1985–1989 history of appreciation payments.

[14] In November 1990, the Respondent gave a bonus to the Electrical Workers-represented El Paso Rod Mill employees, as well as to the unrepresented day's-pay employees at that mill, but to no employees at any other mining company operations. This payment was made by the Respondent assertedly for a variety of unique reasons relating to local accomplishments (''highest quality product in the Plant's history . . . production records have been broken . . . your safety record is the best it's ever been''). In addition, the Respondent invoked the fact that the current ''price of copper'' was ''unexpectedly high.'' Therefore, this payment did not represent in any sense a ''counterpart'' for any of the payments being, given under the quarterly program to the ''union-free'' employees on a companywide basis. Moreover, I note that this bonus was not paid at the same time payments were being made to ''union-free'' workers under the new program. Indeed, the timing of this unilateral payment by the Respondent—roughly a month after the complaints had been issued against the Respondent's exclusion of the union-represented employees at El Paso and Tyrone from payments made under the new program—invites the suspicion that the payment was inspired by a wish to repair or enhance the Respondent's legal position in these proceedings. For all these reasons, that postcomplaint payment does not weigh significantly in my ultimate judgment about the motives of the Respondent in devising and implementing the new program, or about other questions bearing on the legality of these actions by the Respondent.

[15] Since 1985, the mining company has operated at least six such facilities at four separate locations. After January 1987, the totals became, respectively, eight, and five, for it was then that the Respondent acquired a mine and a smelter at Hurley, New Mexico, known collectively as the ''Chino'' operations.

[16] From January 1988 until May 1989, he had held the position of executive vice president; from 1985 until January 1988 he had been senior vice president.

[17] In the most recent labor agreement, the Respondent recognized the Electrical Workers as the bargaining representative for a unit of ''all hourly-rated production and maintenance employees'' at the El Paso Rod Mill. The parties stipulated that the rod mill also employs

since their joint certification by the Board in 1968, the Respondent has recognized and contracted with the Steelworkers, the Operating Engineers, and the Teamsters—acting jointly as the PACT Union—as the representative of a nearly all-inclusive unit of production and maintenance employees, drivers, and equipment operators.[18] It is only the unit employees and Unions at those El Paso and Tyrone operations whose rights under the Act are called into question in these proceedings.[19]

When these cases were submitted, employees in the El Paso Electrical Workers' unit were covered by a labor agreement for the period May 30, 1988, through May 29, 1991, and the PACT union-represented employees at Tyrone were covered by a contract for the period April 3, 1987, through June 30, 1991. Those labor agreements, like their predecessors, were silent on the subject of appreciation payments, or on the subject of ''bonuses,'' generally.

Since 1985, four of the Respondent's facilities have been entirely nonunion: A refinery at El Paso, Texas, where, until 1985, the roughly 300 production and maintenance workers had been represented by a Steelworkers Local;[20] a mine at Morenci, Arizona, where the Steelworkers had likewise represented production and maintenance classifications until approximately 1985;[21] a smelter at Hidalgo, New Mexico, and a rod mill in Norwich, Connecticut. All day's-pay employees at these facilities, together with all day's-pay employees at the Tyrone Mine and the El Paso Rod Mill who are excluded from the established PACT Union and Electrical Workers bargaining units, now comprise the class of employees which, since March 1990, the Respondent has come to call in various writings its ''Union[-]Free'' employees.

IV. 1985–1989 APPRECIATION PAYMENTS

A. *In Overview*

From October 1985 to late August 1989, the Respondent gave a total of eight self-styled ''appreciation payments''[22] to day's-pay employees working for the mining company. Seven of the eight payments were given to day's-pay employees at most or all operations. In the exceptional case, Judd authorized a payment in February 1987 to employees at the (nonunion) El Paso refinery only, which, as he explained, was conferred in appreciation for the innovations and contributions to reduced local production costs made by the refinery's ''tank house'' employees. Because, as Judd admitted, this refinery-only payment was based on a ''unique event,'' it has little pertinence to the more general question of ''practice'' associated with payments based on ''profit.''[23] Therefore, my findings and analyses hereafter will focus on the history of the seven *multifacility* payments made in the 1985–1989 period.

Many details concerning this history are disclosed in an ''outline'' of ''prior appreciation payments'' prepared by Marcus in a June 29, 1989 memorandum to Judd and his executive committee, at the time this group was considering the scope and amount of the appreciation payment that would eventually be made to employees on a companywide basis on August 11, 1989. In the chart below, I have incorporated Marcus' ''outline'' in its entirety, but I have added to it (all text within brackets) to incorporate the August 1989 payment, and to provide a more comprehensive depiction of the formula used and the locational reach of all multifacility payments made in the 1985–1989 period:

Date	*Payment Formula*
10/3/85	20 hrs. at employee's straight time rate of pay. [Paid at all ''Western Operations'' facilities; excluded only Norwich, Connecticut rod mill.]
7/23/86	20 hrs. at employee's straight time rate of pay [Paid Mining Company-wide]

''days-pay'' workers outside that unit, namely ''security officers'' and a ''custodian.''

[18] Marcus estimated that in July 1989 there were roughly 450 day's-pay employees in the PACT bargaining unit, plus another roughly 50 day's-pay employees at Tyrone working in nonunit positions. (The parties stipulated that these nonunit classifications at Tyrone were: ''electrician, carpenter, testmen and watchmen.'')

[19] This is so even though the parties stipulated that when the Respondent bought the mine and smelter at Hurley, New Mexico, known as the ''Chino'' operations in January 1987, it recognized the incumbent Unions at those facilities and adopted the current labor agreements in effect there. The parties' stipulation does not further identify the incumbent unions in the Chino operations, nor does the record otherwise significantly clarify the labor relations picture at those operations. The complaints do not allege that employees' rights in the Chino unit(s) were in any way implicated by the Respondent's actions, nor does the General Counsel otherwise make such a claim. I therefore give no further consideration to such questions.

[20] That Local was decertified in January 1985, at the end of a 2-year strike. See *Phelps Dodge Refining Corp.*, 299 NLRB 1111 (1990).

[21] Marcus testified that at Morenci, as at the El Paso refinery, the Steelworkers had been decertified after a 2-year strike.

[22] In the early days, these were also called ''bonuses'' by some company officials, even though Marcus testified that this latter usage was officially disfavored within the corporation, and the Respondent's attorneys have strictly avoided the term. However, Judd himself—no stranger to official corporate usage—spontaneously used the term ''bonus'' in his testimony to characterize the payments made in the 1985–1989 period. Without finding that it explains the efforts on the part of Marcus and the Respondent's counsel to avoid using the term ''bonus'' to describe payments made in the 1985–1989 period, I note that in his June 29, 1989 memorandum to Judd, et al., quoted infra, Marcus used the term ''bonus'' only to characterize the payment that might be made to ''salaried employees'' at the time an ''appreciation payment'' was being conferred on the ''day's-pay'' employees.

[23] In Judd's testimony at Tr. 300, he explains that the El Paso refinery-only payment was unique among the 1985–1989 payments not only in that it went to employees at a single operation, but also because, unlike other payments made in the 1985–1989 period, it involved a two-tier payment formula, whereby a bigger percentage was given to employees in the ''tank house,'' whom Judd credited for certain production innovations, and a littler percentage to the rest of the refinery employees. Judd admitted, incidentally, that the latter employees were included ''so we wouldn't be in a situation where we made . . . 200 people [in the tank house] happy and 300 people [elsewhere in the refinery] mad. That was the motivation.''

In any case, as my findings below reveal, this refinery-only payment did not appear in Marcus' own ''outline'' of the Respondent's ''prior appreciation payments'' when a new (companywide) payment was under consideration in June 1989.

8/3/87	20 hrs. at employee's straight time rate of pay [Paid at all mines and smelters—total of 4 locations—excluded El Paso Refinery and El Paso and Norwich rod mills]
12/15/87	$1/hr. for hrs. worked and vacation hrs. during prior 26-wk. period. [Paid Mining Company-wide]
5/88	80 hrs. at employee's straight-time rate of pay [Paid Mining Company-wide]
11/18/88	$2/hr. for hrs. worked and vacation hrs. during prior 26-wk. period. [Paid Mining Company-wide]
[August 1989]	[$1 for hrs. worked and vacation hrs. during prior 26-wk. period. Paid Mining Company-wide.]

Judd testified that he was inspired to confer the first of these payments by a wish to share with the employees the profits the Company had finally realized after years of posting consecutive quarterly losses, totaling $450 million from 1981 through 1984.[24] Thus it was that on October 3, 1985, a check and a cover letter was transmitted over Judd's signature to ''Each Day's-Pay Employee of Phelps Dodge's Western Operations.'' Materially, Judd stated in that letter:

> As you probably know, Phelps Dodge reported a profit in each of the first two quarters of 1985, the first time we have had back-to-back profitable quarters since 1981. Much of the credit for that remarkable performance belongs to you and the other members of the Western Operations team, whose effectiveness in containing costs and improving productivity enabled the Company to show a profit during a period when copper prices in real terms hovered near their lowest levels in more than 50 years.
>
> . . . .
>
> I am pleased to enclose the Company's check, made out to you, in an amount equal to 20 hours of pay at your regular straight-time rate less any deductions required by law. This check, like similar ones being sent today to all other day's-pay employees in Western Operations, is the Company's way of recognizing and thanking you for your efforts in the periods just completed. Whether additional such payments can be made in the future, and whether and when wage rates can be increased, will depend upon economic developments in the copper industry and upon the Company's financial condition and performance. How well the Company does depends primarily upon the copper price and upon our production costs; since we cannot influence the copper price, let's redouble our effort to keep efficiencies high and costs low.

[24] Judd stated—and everyone appears to agree—that the United States copper industry generally suffered a serious depression in the early 1980s, due in large part to plummeting copper prices, and that the Respondent's ability to survive was at one point in doubt.

Like the first one, each of the successive multifacility appreciation payments made through August 1989 was made by check, with appropriate withholdings for state and Federal taxes. In each case also, the checks were accompanied by letters from Judd which contained echoes of the themes revealed in the October 1985 letter just quoted (in substance, that appreciation payments depended on the Respondent's ''profitability'' or ''financial condition,'' and that ''copper price'' was an important factor affecting this condition, but that it was in helping to maintain ''low production costs'' that employees might help keep the Company profitable even when the copper market was not cooperating). This thematic continuity is largely evident simply by comparing the text of Judd's October 1985 letter, above, enclosed with the first payment, to the text of his August 11, 1989 letter, enclosed with the last of the payments made before the introduction of the 1990 program for the ''union-free'' employees:

> [August 11, 1989]
> TO EACH DAY'S-PAY EMPLOYEE:
>
> It is my pleasure to advise you that you will recieve a special payment . . . equal to $1.00 multiplied by your work and vacation hours (including overtime) in the 26-week period beginning January 1, 1989. Although the amounts will be based on each employee's actual hours, each of those employees who worked consistently throughout this period will receive a pretax payment of approximately $1,000.
>
> Whether additional payments will be made in the future depends upon developments in the very competitive copper industry which include:
>
> The fluctuating COMEX spot price of copper which dropped from a high of $1.63 on December 8, 1988 to a recent low of $0.99 on July 6, 1989.
>
> Phelps Dodge wages being among the highest industry even after the results of bargaining at [rival copper companies] Magma and Asarco.
>
> Our capital improvement program which provides for improved efficiencies, lower production costs, and thereby greater job security.
>
> How well the Company does depends primarily upon our production rate, our production costs, and the price of copper. Your continued efforts to achieve greater production and lower costs in a safe manner is deeply appreciated.

B. *The ''Program'' Underlying the Calculatedly Erratic 1985–1989 Payments*

The Respondent admittedly went out of its way to make these payments at irregular intervals and according to varying payment formulas. Judd testified (emphasis added):

> [W]e were very careful not to pattern it . . .[.] We didn't want to set a pattern. We didn't want to set expectations and for some reason not be able to meet them. We wanted full discretion in doing that *program*.

I find it revealing in this passage, and not just ironic, that Judd would concede that the 1985–1989 history of payments had a ''program[atic]'' quality. And Marcus, too, spontane-

ously used that term to describe the payments made in that period; thus, he said (emphasis added),

> We were aware of complaints to the earlier *program* and, when we decided to come up with the compensation for our unrepresented employees [the 1990 Union-Free Program], we thought it best to come up with it in a predictable fashion because of those complaints.

I am struck, as well, by the appearance from Judd's admissions elsewhere that an underlying feature of the 1985–1989 ''program'' was a corporate wish to use these payments to communicate a variety of special ''messages'' to the employee-beneficiaries. Judd not only acknowledged this a general proposition, in reply to examination by union counsel, but he spontaneously gave examples of cases where payments were used to convey a more subtle ''message'' than the explicit one announced in association with such payments. Thus, Judd suggested that the *timing* of some payments had been influenced by a separate corporate decision to pay a dividend to shareholders, or to raise executive pay levels, thereby spurring a decision to make an appreciation payment to the day's-pay employees, so as not to embitter the latter group. Another example of this was the July 1986 payment, made on a companywide basis. There, Judd explained, his decision to make that payment *at that time* was closely related to two recent circumstances: First, in 1986, many of the Respondent's competitors (many of which had bargaining relationships with the Steelworkers and other unions) had extracted significant wage cuts or ''givebacks'' as part of new contract settlements. Second, in the aftermath of this, Judd had conducted informal ''tailgate'' meetings at various copper operations with union-represented and nonunion employees alike, and had heard them express concerns that the Respondent, too, might wish to cut wages. Judd admittedly found in these circumstances a particularly good reason to choose in July 1986 to confer another bonus. He explained,

> [B]y '86 we'd had four or five, looking at six, profitable quarters [since the last payment in October 1985]. . . . We thought it would be very appropriate that we could give a bonus [sic] at that time and (a) allay those fears and (b) reinforce that we felt that they were working for . . . the best copper company in the world, so that while other competitors were taking money back we were continuing to give these appreciation bonuses [sic]. . . . I must say, we were also motivated by the uncertainty that they'd expressed.

I infer from all of this that the Respondent had decided early on as a matter of policy that the Respondent would periodically share profits with its employees,[25] but, for its own reasons, had decided to disguise the ''programatic'' quality of this policy so as to retain maximum flexibility or ''discretion'' in applying it. And Judd's testimony also makes it clear that one reason the Respondent wished to enjoy such discretion was to allow it to *time* each particular payment for its maximum ''message'' impact. In addition, because retaining ''full discretion'' was admittedly so important to the Respondent in implementing this ''program,'' and because it is not obvious how the Respondent's discretion might be limited in such matters except by its statutory collective-bargaining obligations to the Unions, I infer that the Respondent's concerns about retaining ''full discretion'' in pursuing the 1985–1989 ''program'' included, perhaps even focused on, a wish to avoid any claim in the union-represented units that such payments were mandatory bargaining subjects.[26]

C. *Union-Employer Communications About Appreciation Payments*

1. The 1988 El Paso Rod Mill contract talks

Most of the facts relating to pertinent communications between the Respondent and the Unions are not disputed. The Respondent had always resisted as a matter of policy any limits on its ''full discretion'' in making appreciation payments in the 1985–1989 period. As I have previously noted, this policy was admittedly informed, at least in part, by a corporate wish not to invite unions to try to make such matters subjects for collective bargaining. But in at least three documented cases—October 1985, July 1986, and November 1988—the Respondent nevertheless notified the Electrical Workers in writing that such a ''bonus'' payment would be or was being made to employees in the El Paso Rod Mill bargaining unit. The Unions admittedly never objected to the payments made to employees in the units represented by them during this period.

The subject of these payments came up once in the context of bargaining in 1988 for a new labor agreement for employees at the El Paso Rod Mill. For findings about those 1988 bargaining exchanges, I rely on the uncontradicted testimony of Electrical Workers Agent Norman Sachse,[27] materially

---

[25] Judd and Marcus generally acknowledge in their testimony what the record shows overall—that the seven outlined multifacility payments were linked in public announcements and in actual fact to the Respondent's current state of ''profitability.'' Marcus states, however, that in his own review on this subject, he found that the 1985–1989 payment dates did not correlate with corporate profit peaks. This is not surprising, however, when one recalls that the Respondent intentionally tried to impose a quality of ''randomness'' on the timing of each payment. In addition, as I have just noted, Judd admitted that the precise timing of payments in the 1985–1989 period often had less to do with the Respondent's current *level* of profitability than it did with a wish to indirectly convey a more subtle ''message,'' for example,

> [to] (a) allay those [''giveback''] fears and (b) reinforce that we felt that they were working for . . . the best copper company in the world, so that while other competitors were taking money back we were continuing to give these appreciation bonuses.

[26] The record otherwise reinforces this inference. Thus, in his June 29, 1989 memo to Judd et al. (quoted more fully, infra), Marcus cautioned against excluding the (union-represented) Chino operations from the next payment because this might cause the Chino union(s), in ''potential early negotiations'' for a new labor agreement, to demand that appreciation payments ''become part of a negotiated agreement.'' And Marcus elsewhere revealed a hypersensitivity to the collective-bargaining implications under the Act of an employer's establishing of a ''practice'' affecting the wages or other forms of compensation of union-represented groups of employees, admittedly based on his belief that ''practice in a union-represented bargaining unit . . . may become part of a legal obligation.'' (Tr. 172:18–173:4; 197:1–198:18.)

[27] Electrical Workers Agent Sachse also testified in a somewhat confusing way about references to ''bonuses'' made during negotia-

Continued

supported by Sachse's union colleague, Carlos Esparza. As Sachse's account shows, the Electrical Workers had sought an increase in the unit employees' ''base rates.'' The Rod Mill's plant manager, Robert Pierce, flatly ruled that out, using words to the effect:

> You're out of your damn minds. There is not going to be any increase to the base rates. We have been providing bonuses over . . . the past 20 years. Apparently those bonuses have no meaning to your members whatsoever.

One of the union agents asked at some point whether the Company ''would be willing to include something in the agreement'' relating to these ''periodic bonuses.'' To this, Pierce replied, as Sachse recounted it,

> [T]he company could not be sure that they were going to be profitable, when those profits would occur, and therefore they could not know in any way what amounts would be paid; and to include that in the agreement would be too difficult and that the [union] committee and the employees would have to trust the company in that matter because they had paid them in the past.

2. Disputed 1987 Guadiana-Ladd meeting

There is controversy in the record about only one alleged historical event; it contains two distinctly disputed elements: (a) Did a certain ''informal'' meeting take place in early 1987 between the Steelworkers' International representative, Robert Guadiana, and the Respondent's chief labor relations spokesman and negotiator at the time, John (Jack) Ladd? And, (b) if so, what, if anything, did Ladd say on the subject of future appreciation payments or bonuses? In Guadiana's version—entirely disputed by Ladd, who denies any recollection of any meeting with Guadiana at all—Ladd sought out Guadiana for ''informal'' prediscussions in anticipation of the expiration of the current PACT union contract at Tyrone, but before the start of formal contract talks with the PACT Union as a joint body, which were due to begin later that year. In the course of these discussions, says Guadiana, Ladd gave a sidebar assurance that the Tyrone operation would participate in future appreciation bonuses, but refused to put this in writing. Guadiana says he acquiesced in this ''informal'' assurance because Ladd had a ''reputation'' in union circles as someone whose word ''can be taken to the bank.''

I was struck by nothing in the testimonial performance or demeanor of either Guadiana or Ladd which would warrant my crediting one over the other. I have closely considered the parties' arguments and counterarguments about the inherent probabilities or likelihoods in the light of the surrounding circumstances. I think these arguments commonly tend to peter out into speculation. It was the prosecution's burden to establish by a preponderance of the credible evidence that Guadiana's claims were more believable than Ladd's denials. I can find neither in demeanor nor probabilities that this burden was met.[28] In any case, I will not be required to rely on Guadiana's version to support my ultimate findings.

tions in 1985, some 6 months before the first ''appreciation payment'' was made, in October 1985. I do not rely on this testimony.

D. *June–August 1989; the Respondent Considers the Amount and Reach of What Will be its Final ''Union-Blind'' Payment*

In June 1989, top executives of the Respondent considered—admittedly for the first time—the possibility of excluding from the next appreciation payment the roughly 450 employees in the PACT union bargaining unit at the Tyrone mine. Marcus had suggested arguments for and against such an exclusion in a June 29 memorandum to Judd and other members of an executive committee (i.e., the same memorandum containing his ''outline'' of ''prior appreciation payments'' quoted earlier). He had also raised a similarly union-conscious question with respect to the ''Chino'' mine and smelter operations. Thus:

> DATE: June 29, 1989
> FROM: S. L. Marcus
> TO: L. R. Judd [et al.]
>
> SUBJECT: APPRECIATION PAYMENTS
>
> With our prior decision to consider another appreciation payment in July, I submit the following for your review:
>
> I. *Day's-Pay Employees*
>
> 1. Should Tyrone employees receive an appreciation payment?
>
> Since the employees rejected our proposed wage increase in February,[29] we could take the position that we will only provide that compensation required by the contract and not provide an appreciation payment. Alternatively, there is little to gain from the anger that would be generated by not including Tyrone employees in the appreciation payment.
>
> 2. Should Chino employees receive an appreciation payment?

[28] Where neither demeanor nor probabilities favored either side, it certainly did not aid the prosecution that Guadiana himself vouched for Judd's reputation for scrupulous veracity in labor relations dealings.

[29] Marcus was referring to the following recent history at Tyrone: In February 1989, the Respondent and the PACT Union had met briefly on a ''voluntary'' basis to discuss ''reopening'' the 1987–1991 contract. The Respondent was then interested primarily in supplanting the current contract with a new 4-year agreement, one which would help keep its labor costs predictable through a point in 1995. In exchange, the Respondent offered the PACT Union immediate wage increases of 4 to 4-1/2 percent, depending on unit job classification. The parties reached tentative agreement at the table on this offer and the package was submitted for ratification by the combined PACT membership, which voted it down. (As Marcus understood it, the failure to get ratification was traceable to the opposition of Steelworkers International Representative Guadiana, who, as Marcus believed, had vowed to oppose ratification by Steelworkers members, who were apparently the largest member bloc within the PACT-represented classifications.) In any case, the outcome was that the original 1987–1991 labor agreement at Tyrone was undisturbed, and continued to govern thereafter.

> With the potential of entering into early negotiations at Chino, we may wish to postpone making another appreciation payment. However, since we do not wish such payments to become part of a negotiated agreement, we may want to make such payment at the same time we do at other locations.
>
> 3. What should the amount of the appreciation payment be?
>
> [Outline of ''prior appreciation payments'' and remainder of memorandum omitted].

Concerning the question of a payment to unit employees at Tyrone,[30] Marcus testified that it was his ''alternative'' point (''little to gain from the anger that would be generated'') which prevailed, and became the rationale adopted by the executive committee in deciding to make the payment (made in fact on August 11, 1989) to all day's-pay employees, companywide.

V. THE 1990 PROGRAM FOR ''UNION-FREE'' EMPLOYEES

A. *In General*

It was against all the foregoing background that, on March 26, 1990, the Respondent unilaterally announced the ''Phelps Dodge Mining Company Union Free Day's-Pay Quarterly Appreciation Payment Program.'' The new program was approved by Judd in its final form in an executive meeting on March 12, 1990. According to Marcus, the new program was really the outgrowth of a process of reviewing the ''compensation'' paid to its ''union-free'' workers which Marcus had begun as early as November 1989. As Marcus admitted, however, the matter of a ''supplemental compensation'' (i.e., ''bonus'') program for these workers was not recommended by Marcus nor otherwise discussed in executive circles until February 1990. Accordingly, it appears that the program was the product of relatively brief executive attention before Judd gave it the final go ahead on March 12.

As I discuss in my concluding analyses, exactly how, when and why a decision to embark on such a program was arrived at are questions which neither Judd nor Marcus ever clearly answered. And, to some extent, those witnesses have contradicted themselves and one another in accounting for the origins of the new program. That aside, no one disputes that, after March 12, it fell to Marcus to prepare all associated paperwork and publicity and information kits. Most of these were delivered to local managers in a March 23 package which included a covering memorandum from Marcus summarizing the program and directing how and when the various announcement materials were to be distributed. In that memorandum, Marcus wrote, inter alia,

> After carefully studying our prior appreciation payments, the Company has decided to implement a program of quarterly appreciation payments linked to the COMEX price of copper. This Program applies to union free day's-pay Mining Company employees. . . . The program is retroactive to October 1, 1989.
>
> Attached are letters and documents to be used in announcing the program:
>
> (1) On Monday, March 26, 1990, Mr. Judd's letter should be sent to the homes of all eligible union free day's-pay employees.
>
> (2) On Tuesday, March 27, . . . meetings should be held with local supervision to explain the details.
>
> (3) By April 15, . . . the Appreciation Payment check should be mailed to each employee with the enclosed Manager's letter and a copy of the Quarterly Appreciation Payment Plan Program Table.
>
> (4) Meetings should be scheduled with all day's-pay employees to explain this new program.

''Mr. Judd's letter,'' referred to in Marcus' instructions, contains much information relevant to the new program and is otherwise relevant to a variety of ultimate questions. I repeat it in full here, minus only letterhead boilerplate:

> March 26, 1990
>
> TO: All Union Free Day's-Pay Employees
> Phelps Dodge Mining Company
>
> SUBJECT: Appreciation Payments
>
> Phelps Dodge is proud of the fact that we were the first company in the copper industry to provide our employees with appreciation payments. These payments have allowed us to share our good fortune during periods of high copper prices, while maintainlng our competitiveness during periods of low copper prices. Since our first appreciation payment in 1985, the average employee has received over $6,000 in payments.
>
> We continue to believe it is important that Phelps Dodge provide you with a competitive wage and benefit package, but it is even more important that we strive to maintain our ability to operate and provide continued employment when copper prices again decline. All employees have welcomed the past appreciation payments, although there has been a concern that these payments have been difficult to predict.[31]
>
> To address this issue, I am pleased to advise you that Phelps Dodge will be implementing a program of Quarterly Appreciation Payments linked to the COMEX price of copper. The first payment will cover not only this year's first quarter, but also the last quarter of 1989. Based upon our estimate of the copper price for these two quarters your appreciation payment, to be mailed by April 15, 1990, will be 5.5% of your covered earnings, less applicable taxes.

[30] Marcus admitted that his references to ''Tyrone employees'' in his memorandum were intended to apply specifically to the ''unit'' employees at Tyrone, and that no consideration was ever given by him or other company executives to excluding the non-''unit'' day's-pay employees at Tyrone from this payment.

[31] In this regard, both Marcus and Judd admit that they were well aware that ''concerns'' about the ''predict[ability]'' of the ''past appreciation payments'' had been voiced commonly by union-represented employees and by their unrepresented counterparts alike over the years. And I note here, as found above, that the Respondent had not been so solicitous of these ''concerns'' when, in 1988, the Electrical Workers had sought, during bargaining with the Respondent for a new contract at the El Paso Rod Mill, to provide in the contract for appreciation payments or bonuses to be paid according to a predictable and objective scheme.

> Your local management will be explaining the details of the new Quarterly Appreciation Payment Program to you. I know you will find this to be another benefit of working for the world's best and safest mining company.
>
> Sincerely,
>
> /s/ L. R. Judd

As described in a separate explanatory memorandum from Marcus' office, the ''Program'' consisted of several ''Components.'' For our purposes it suffices to find that, subject to two overarching conditions,[32] the Respondent promised, through the program, to give each ''union-free'' employee in the mining company's operations a bonus check every 3 months, based on an ''objective'' and ''predictable'' formula—in which a COMEX price-linked ''percentage'' would be multiplied by the employee's previous ''covered quarterly earnings'' to yield a gross payment amount, from which appropriate taxes would then be withheld.

On April 15, the Respondent made its first payment under this program, mailing a check (with a Marcus-drafted ''manager's letter'' enclosed) to each ''union-free'' employee, in an amount equal to 5.5 percent of that employee's earnings since October 1, 1989, minus normal tax deductions. In July 1990, when the next quarterly payment was made, the COMEX price of copper had risen enough to allow a bigger check for each unrepresented employee, this time amounting to 5.75 percent of his or her earnings in the previous quarter. In October 1990, the bonus percentage multiplier became 6.25 percent.

B. *Other Circumstances Bearing on the Timing of and Motives Surrounding the Introduction of the New Program*

1. Appearance of the ''Union-Free'' usage

''Union[-]Free'' became official usage in the Respondent's corporate writings for the first time in and after March 1990, almost exclusively as part of the publicity surrounding the introduction of the quarterly appreciation payment program. Marcus admits that, with a single exception, the expression ''union-free'' as a description of employees who were not represented by a union had never appeared in any corporate writings until March 1990.[33] Instead, until that point, the Respondent had used terms such as ''non-union,''[34] or ''not covered by a collective bargaining agreement''[35] whenever the Respondent found it necessary to distinguish among day's-pay employees based on their ''union'' status.

Judd was responsible for this changeover in official usage; he admittedly directed Marcus at some point after Marcus issued his February 27, 1990 memorandum (which had used the expression ''non-union'' to describe the recipients of the payments under the new quarterly program) to start using ''union[-]free'' from now on. And, consistent with Judd's admitted historical practice of using appreciation payments to convey ''messages'' other than one of mere ''appreciation'' for employees' efforts, Judd explained that it was important to him that the new program be portrayed to employees in the ''right'' light. And Judd admittedly saw ''union-free'' as a more ''positive'' way of describing the ''unrepresented'' or ''non-represented'' status of the employees who would be the beneficiaries of the Respondent's ''gener[osity]'' under the new program.

As a consequence, the expression began to appear in virtually every communication concerning the program sent from Marcus' office to local managers or intended for distribution to employees at the ''union-free'' operations, including in charts and tables given to ''union-free'' employees so that they could compute for themselves how much to expect from their next quarterly bonus.[36]

2. The PACT union decertification ''Opportunity'' at Tyrone

The Respondent's announcement of the union free quarterly appreciation payment program was made a scant week before the date when it would become legally possible for employees to petition the Board to hold an election among the 450 Tyrone unit employees to decide whether or not the PACT Union would continue to represent them.[37] This practical legal reality was admittedly recognized and understood by Marcus at the time his staff was working up the new program. In fact, employees at Tyrone did file a decertification election petition with the Regional Director in August 1990, but the Regional Director provisionally dismissed that petition as having been tainted by the Respondent's announce-

---

[32] One condition was that payments would be made only if the COMEX price reached or exceeded ''predetermined levels''; the other was implicit in the final sentence of Marcus' March 23 list of program ''Components'':

> This program . . . may be suspended or modified from time to time.

[33] Thus, acting in response to a subpoena, Marcus and his employee relations staff conducted a diligent search of company records; they could find only one case—a single document associated with a single, local operation—where ''union-free'' had ever before appeared in any writing generated at any level of the Respondent's operations. This exceptional writing is a reference in a 1985-published employee handbook for Morenci Mine employees, where, as previously noted, the Steelworkers had only recently been decertified. In that handbook the Morenci operation had been described as a ''union-free environment.''

[34] E.g., G.C. Exh. 9 (Marcus 2/27/90 Memorandum to Judd and other members of executive committee, written slightly less than 1 month before ''union free'' became the corporate expression of choice):

> As requested, I have evaluated alternative methods for providing our non-union day's-pay employees with wage adjustments contingent on the price of copper.

[35] E.g., Union Exh. 1 (Judd letter to (nonunion) Hidalgo (New Mexico) smelter employees, 12/19/88):

> I am happy to advise you that the Company is implementing a wage rate increase for day's-pay employees not covered by a collective bargaining agreement.

[36] E.g., G.C. Exhs. 6, 10, 11, 12, and 13.

[37] As found earlier, the PACT union-represented employees at Tyrone were covered by a 4-year labor agreement which ran, by its terms, from April 3, 1987, through June 30, 1991. Under established contract-bar principles, the Respondent's 1987–1991 agreement with the PACT Union could not operate as a bar to an election petition beyond its first 3 years. And this meant, in practical effect, that anyone seeking to decertify or replace the PACT Union could lawfully file a petition for an election at Tyrone at any point after April 3, 1990.

ment and implementation in March–April of the new program.[38]

VI. ANALYSIS, SUPPLEMENTAL FINDINGS, AND CONCLUSIONS OF LAW

Although many facts have overlapping relevance to all the issues, the 8(a)(3) and (5) questions will to some extent require a focus on different bodies of facts. Thus, as the cases discussed below make clear, we should be more concerned with the question of the Respondent's 1990 motives in analyzing the 8(a)(3) counts, and we should be more concerned with the Respondent's 1985–1989 practices respecting appreciation payments in analyzing the 8(a)(5) claims that the 1990 program constituted an unlawful unilateral ''change'' in established ''wages'' or other forms of ''compensation'' enjoyed by El Paso and Tyrone unit employees.

But this case also calls into question whether the Respondent's ''Program'' itself had an inherently unlawful tendency under Section 8(a)(1) of the Act to ''interfere with, restrain, or coerce employees in the exercise of'' Section 7 rights, specifically the right to be represented by a union.[39] And, as I discuss next, that question depends little for its resolution on the Respondent's motives, or its past practices, but depends largely on the particular ''language'' used by the Respondent to define those who would be included or excluded from the program's reach.

A. *The 1990 Program as an ''Inherent'' Violation of Section 8(a)(1)*

In *Lynn-Edwards Corp*., 290 NLRB 202, 204 (1988), the Board stated (emphasis added):

> It is well settled that an employer violates Section 8(a)(1) through *a provision in, or a statement about*, a plan that suggests that coverage of employees will automatically be withdrawn as soon as they become represented by a union or that continued coverage under the plan will not be subject to bargaining. See, e.g., *Niagara Wires*, 240 NLRB 1326 (1979).

In its recent holding and discussion of authorities in *KEZI, Inc*., 300 NLRB 594 (1990), the Board has reaffirmed, on the other hand, that it has

> not hesitated to find eligibility language lawful when . . . it indicates that . . . benefits for unionized employees are subject to negotiation but does not suggest that employees are automatically and irrevocably foreclosed from inclusion in a particular plan simply because they have a union bargaining on their behalf.[40]

The Board found that the ''eligibility language'' in *KEZI*'s 401(k) plan passed legal muster, but it ''distinguish[ed]'' that case from others, such as *Niagara Wires*, supra, ''in which the *exclusionary language* did not *expressly contemplate good faith bargaining* over . . . benefits.''[41]

In this case, the ''eligibility [or 'exclusionary'] language'' analog is the Respondent's expression ''union-free'' in the Respondent's own title for the program, as well as its repetition of that expression in its various announcements and descriptions of the program, or of payments made under it. The Respondent has nowhere ''indicated''—neither ''expressly,'' nor otherwise—that it ''contemplated good faith bargaining'' with the Unions over the inclusion of union-represented employees under the quarterly program. To the contrary, by using the inherently sweeping expression, ''union-free,'' the Respondent necessarily invited quite the opposite inference—that nothing short of full ''freedom'' from *all* ''union'' entanglements would suffice to make one eligible for ''coverage'' under the program.[42] Seen this way, the program ''suggest[s] that employees are automatically and irrevocably foreclosed from inclusion in a particular plan simply because they have a union bargaining on their behalf.'' *KEZI, Inc*., supra.

Based on those considerations alone, I find that the Respondent independently violated Section 8(a)(1) by the fact that it defined and described the 1990 program as being for ''union-free'' employees only.

B. *The 8(a)(3) Discrimination*

The Respondent defends against the 8(a)(3) count by invoking *Shell Oil Co*., 77 NLRB 1306 (1948), and *B. F. Goodrich Co*., 195 NLRB 914 (1972). In *Shell*, the Board declared these general propositions:

> *Absent an unlawful motive*, an employer is privileged to give wage increases to his unorganized employees at a time when his other employees are seeking to bargain collectively through a statutory representative. Likewise, an employer is under no obligation, under the Act, to make such wage increases applicable to union members, in the face of collective bargaining negotiations on their behalf involving much higher stakes.[43]

In *B. F. Goodrich*, reaffirming *Shell* in this respect, the Board said,

> The granting of new profit-sharing benefits to unorganized employees, but not to represented employees is not, *standing alone*, prohibited discrimination.[44]

But in the footnote appended to the underscored text, the *Goodrich* Board cited an example of circumstances where an ''unlawful motive'' would be found; thus:

---

[38] There is no evidence that the Respondent engaged in any unlawful acts to promote decertification of the PACT Union other than by announcing and implementing the union-free program.

[39] The complaints do not allege in haec verba that the announcement and implementation of the new program had an ''inherently'' coercive impact on employees' Sec. 7 rights, but they do allege that, on ''March 26, 1990,'' the Respondent ''informed its employees that it was implementing a Quarterly Appreciation Bonus Plan for 'union free' employees . . .[,]'' and that, by so ''inform[ing]'' employees, among other actions, the Respondent committed independent violations of Sec. 8(a)(1).

[40] Id. at 595 (emphasis added). And see cases discussed and distinguished at fn. 5.

[41] 300 NLRB 595 at fn. 5 (emphasis added).

[42] In my 8(a)(3) analysis below, I will discuss the necessary rhetorical implications of the expression ''union-free'' more fully, and will find in these implications even clearer evidence of specific intent on the Respondent's part to exhort employees to get rid of unions if they were already ''bound'' to them and to keep them out if they were already ''free'' from them.

[43] 77 NLRB at 1310 (emphasis in original text).

[44] 195 NLRB at 915 (emphasis added; in-text fn. omitted).

> Had the grant been accompanied by *statements encouraging the employees to abandon collective representation* in order to secure the benefit, for example, we would have *clear evidence* of unlawful 8(a)(3) motivation.[45]

I will judge ultimately that the Respondent's motives in devising and implementing the new program for only its ''union-free'' employees was to make union membership or representation by unions appear to the Respondent's employees to be financially disadvantageous; put another way, I will conclude that the Respondent planned and carried out the new program to provide a financial inducement to employees to become ''union-free'' if they were not already so, and to stay ''union-free'' if they already were. In the absence of any coherent or persuasive counterexplanation, I will presume that the specific timing of the planning and publicizing of the new program was influenced principally by the Respondent's awareness that 450 of its currently union-represented employees at the Tyrone Mine would soon be in a position to vote out the PACT Union, if that were their persuasion, or if they could be so persuaded.

In reaching these conclusions, I might rest simply on the legal fact that the Respondent's own descriptions of the program as being for ''union-free'' employees carried an inherently union-discouraging message, and, this being a foreseeable result of the use of such language, that the Respondent, in fact, *intended* such a result. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33 (1967).[46] But in judging that the Respondent's implementation of the program violated Section 8(a)(3), I have also considered the additional prima facie indicators of unlawful motivation listed next, with particular emphasis on the last one, the ''statements'' by the Respondent which in my view amount alone to ''clear evidence of unlawful motivation,'' as envisioned by the *Goodrich* Board.

1. ''Practice'' as it illuminates ''motive''

Although centrally relevant for 8(a)(5) purposes, an employer's historical ''practices'' are surely relevant also to an understanding of its motives in a given instance of behavior. Thus, a departure from an established practice of including represented employees in appreciation payments (which, as I shall find, is what happened here) will itself raise an inference of discriminatory intent.[47] Although I will elaborate on other aspects of ''practice'' in my discussion of the 8(a)(5) issues, I will recapitulate here those features of the 1985–1989 practice which I deem most revealing in assessing the Respondent's motives for devising and implementing the 1990 program.

All eight payments made in the 1985–1989 period were ''union-blind''; that is, in no case did the Respondent link eligibility for an appreciation payment to an employee's union-represented or unrepresented status. Union-represented employees at Tyrone and El Paso always received a payment to the same extent that the unrepresented day's-pay employees at the same locations were included, and always according to the same formula. Indeed, historically, it made no difference to the Respondent that recipients might be covered by a current collective-bargaining agreement, for the Tyrone and El Paso unit employees, who shared in a substantial majority of these payments (all seven in the case of Tyrone; six of seven in the case of El Paso), were covered at all material times by labor agreements which guaranteed certain wages and benefits, but which were entirely silent on the subject of such appreciation payments or bonuses. Accordingly, against this tradition, one reasonably looks to the Respondent for some clear, ''union-neutral'' explanation for its 1990 decision to exclude union-represented employees from the new program. But, as I discuss elsewhere below, the Respondent has seemingly tried harder to obscure that such an explanation is needed than it has tried to furnish a coherent explanation.

Another feature of the 1985–1989 ''practice'' deserves recalling here: Although company profitability was associated with each payment, and ''copper price'' was admitted by Judd to be the determinative profit factor in the final five bonuses, the *timing* of each payment of 10 was chosen by Judd to achieve maximum impact in conveying a more specific or subtle ''message'' to employees. In the light of this admitted ''practice, '' therefore, we should pay close attention to the timing of the development and announcement of the union-free program to understand what ''message'' Judd may really have intended to convey to employees. And, so far as this record shows, the only opportunity for a ''message'' prevailing at the time of the program's planning and inauguration was the soon-to-arrive window period for an election petition at Tyrone.

2. Improbability or inadequacy of explanations

Both Judd and Marcus, but especially Marcus, appeared to be at their least comfortable and most hypertechnical in parrying questions aimed at allowing them an opportunity to explain the circumstances surrounding the Respondent's decision to limit the 1990 program to ''Union-Free'' employees only. Their discomfort only became heightened when they were regularly reminded that, in late June 1989, they had rejected a suggestion to exclude union-represented employees from an intended payment because there would be ''little to gain from the anger that would be generated'' by excluding them. Precisely what happened some 7 months later to cause the Respondent now to decide, apparently, that there *was* something to be gained ''from the anger that would be generated'' by excluding union-represented employees from an appreciation payment program is something which I believe the Respondent's witnesses have repeatedly sought to obscure. The same is true concerning their handling of questions concerning their reasons for announcing the new program when they did, and in the style or manner they did.

The Respondent's overall credibility is further undermined by the strained attempts of its key actors—particularly Marcus—to create an impression consistent with the Respondent's current claim in litigation—that the 1990 program was ''wholly [or 'totally'] unrelated'' to the 1985–1989 payment history. Thus, Marcus was moved to insist at one point

---

[45] Id. at fn. 4 (emphasis added).

[46] See also *Radio Officers v. NLRB*, 347 U.S. 17 (1954); *Melville Confections, Inc.*, 142 NLRB 1334, 1337–1338 (1963).

[47] *NLRB v. Great Dane Trailers*, supra, 388 U.S. at 32 (emphasis added):

> The act of paying . . . benefits to one group of employees while announcing the *extinction* of the same benefits to another group of employees who are distinguishable only by their participation in protected concerted activity surely may have a discouraging effect on either present or future concerted activity.

that, in working up the 1990 program, he ''was *not concerned* with the 1985 through 1989 payments.'' But, as we have seen in a variety of documents announcing the 1990 program which were signed by Marcus or drafted for Judd's signature by Marcus, the 1990 program was depicted (by Marcus himself) as the product of ''carefully studying our prior appreciation payments.'' And, in announcements to ''union-free'' employees drafted by Marcus for Judd's signature, the Respondent had ''proud[ly]'' invoked the 1985–1989 history and had otherwise unmistakably portrayed the new program as being quite closely related in purpose and theme to the 1985–1989 payments. Indeed, in the aggregate, the message in the first three paragraphs of Judd's March 26 letter was that the 1990 program was developed by the Respondent as an improved *version* of a preexisting (1985–1989) payment ''program,'' one specifically tailored to respond to previous employee ''concerns'' about the lack of ''predictablity'' in the 1985–1989 ''program.''

In the circumstances, for the Respondent now to insist that the two programs are ''wholly unrelated'' smacks of historical revisionism, and of a certain desperateness. As I further discuss in section C, the facial resemblances between the two programs are unmistakable; the paternity is certain; the 1985–1989 ''program'' was father to the 1990 program . But what striking here are the Respondent's attempts to disavow *any kinship at all* between the two programs. This only invites the suspicion that the Respondent was trying to conceal a darker underlying motive for embarking on the 1990 program. *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

I will not attempt to retrace every twist and turn in their explanations, but Judd and Marcus eventually stated in common that the decision to exclude (and necessarily to ''anger'') employees in the Tyrone and El Paso units had something to do with the fact that those employees had already negotiated for their wage and benefit packages and would not be in a position to seek anything more or different until their current labor agreements were to expire. But exactly what Judd and Marcus intended by retreating to this common explanatory ground is not evident to me. One implication, clearly, is that the Respondent was not prepared to extend the quarterly payments to union-represented employees while their current labor agreements were still in effect. But such considerations had never prevented the Respondent in the past from conferring such payments on union-represented employees. Thus, this explanation has a certain non sequitur quality, and it hardly allays the suspicion that the new program was inspired by more immediate and contemporary union-hostile considerations.[48]

Another possible implication in this testimony might be that the Respondent at least would be receptive to bargaining over such inclusion once the Tyrone and El Paso contracts were open for renewal. But it undermines this supposition that the Respondent never overtly declared such a receptiveness to bargaining with the Unions over extending the quarterly program to employees in the units they represented. Moreover, to have done so would have represented a substantial reversal from the Respondent's historical resistance to allowing appreciation payments to become the stuff of collective bargaining; for, in the only credited instance of record when a union tried to negotiate some ''predictability'' about appreciation payments into a new labor agreement (Electrical Workers in 1988 El Paso Rod Mill contract talks), the Respondent even in that context refused to talk about any such thing, claiming that,

> the company could not be sure that they were going to be profitable, when those profits would occur, and therefore they could not know in any way what amounts would be paid; and to include that in the agreement would be too difficult and that the [union] committee and the employees would have to trust the company in that matter because they had paid them in the past.

This same history indeed raises another question never answered by Judd or Marcus; namely: What was it that had changed since the 1988 Rod Mill contract talks to convince the Respondent that it would not be so ''difficult,'' after all, to develop a program of ''predictable'' appreciation payments? The only obvious explanatory circumstance of record is that in 1988, when the Respondent was insisting that ''profits'' were too hard to ''predict,'' and that the Respondent ''could not know in any way what amounts would be paid,'' the party requesting such ''predictability'' was a union, whereas in 1990, the putative beneficiary class would be ''union-free'' workers. And where such unrepresented workers' interests were at stake, apparently, the Respondent was delighted largely to surrender its ''discretion'' and to commit itself to a program which was touted by the Respondent itself as a material improvement over the ''old'' payment program precisely because of its ''predictable'' nature.

Thus, elements of the Respondent's explanations sound hollow or improvised, and clash with one another in terms of their defensive value to the Respondent. In summary, it seems, that in 1985–1989, when the payment ''program''

[48] I have already noted that the timing of the new program's emergence coordinates closely with the timing of the ''window-period'' during which the PACT Union would be vulnerable to being decertified or displaced at Tyrone if sufficient employee interest could be generated to support a decertification or rival election petition to the Board. Here I note another circumstance which points in the same direction: The abortive ''reopener'' bargaining history between the Respondent and the PACT Union earlier in 1989 appears to have been a source of particular irritation to the Respondent. That history was invoked by Marcus in his memo to Judd and other executives on June 29, 1989, as a factor arguably warranting excluding the Tyrone unit employees from the general ''appreciation payment'' eventually given in August 1989 to all employees, including at Tyrone. And it is not hard to detect an element of spite in the way Marcus chose in his June 29, 1989 memo to (mis)characterize this rather complex ''reopener'' history as a ''reject[ion]'' by the Tyrone unit ''employees'' of ''our proposed wage increase.'' (It was also, quite obviously, a ''rejection'' by those employees of the Respondent's wish to lock in labor rates at Tyrone for an additional 4 years.) It thus appears that the Tyrone unit employees' exercise of their right not to accept the proposed extension and modification of their current agreement was an abiding source of the Respondent's corporate disappointment and displeasure. And, having been thwarted in achieving long-term labor rate certainty through the collective-bargaining process, it would not be unthinkable that the Respondent would see the PACT Union as an obstacle to that goal, and would see in the PACT Union's decertification a different means of achieving long-term *unilateral* control of those costs.

was union-blind, it was critically important to the Respondent, as Judd admits, that the payments be ''irregular,'' and ''unpredictable''; but in 1990, when eligibility was restricted to ''union-free'' workers, the Respondent found it not at all difficult to come up in about a month with a highly regular, objective, and predictable version (''improvement,'' really, as I have already noted) of the ''program'' which had evolved in the 1985–1989 period. One can find harmony in all the Respondent's varying positions and explanations only if one posits first a nakedly union-discriminatory underlying motive for the difference in the Respondent's willingness to provide a predictable program of bonuses for its ''union-free'' workers but not for its union-represented ones.

3. ''Statements encouraging the employees to abandon collective representation''

In *B. F. Goodrich*, supra, the Board envisioned that ''statements *encouraging* the employees to abandon collective representation in order to secure the benefit,'' would present ''*clear evidence of unlawful 8(a)(3) motivation*.'' Obviously, such smoking gun statements are not the only basis upon which the Board will infer an unlawfully discriminatory motive in the granting of ''benefits'' only to unrepresented employees. But, where such statements may be found, the 8(a)(3) analysis need not be attenuated, for such statements are ''clear evidence'' of discrimination. For reasons elaborated next, I judge that such a ''statement'' is implicit in the Respondent's conscious choice to introduce the new program—and the expression ''union-free'' into its publicizing of the new program—on the eve of the decertification window period at the Tyrone Mine.

I have previously found that Judd admittedly found it important to portray the 1990 program in the ''right light,'' and admittedly saw ''union-free'' as a more ''positive'' way of describing the ''unrepresented'' or ''non-represented'' status of the employees who would be the beneficiaries of the Respondent's ''gener[osity]'' under the new program. I deem it especially significant to my 8(a)(3) conclusions that, in announcing the new program, Judd admittedly once again wished to convey a ''message'' beyond the mere announcement of the program itself, and that it was with the desire in mind to convey a more ''positive'' message that he instructed Marcus to refer to ''unrepresented'' or ''nonunion'' workers instead as ''union-free'' workers. It is therefore clear enough that the introduction of the expression ''union-free'' was a *rhetorical* choice on Judd's part.

''Rhetorical'' statements are, by definition, intended to *influence* the thoughts and actions of the rhetorical audience,[49] not merely to ''inform'' that audience of the existence of something. In this regard I observe that, as a matter of rhetorical technique, ''free'' is invariably used by a speaker or writer to create ''positive'' associations in the minds of a rhetorical audience, just as his or her use of ''enslaved'' would convey precisely the opposite rhetorical message.

But a mere generalized wish to make a blandly ''positive'' statement does not adequately explain Judd's rhetorical choice to introduce ''union-free'' into the publicity materials surrounding the new program. This is because, when a speaker or writer *appends* the word ''free'' to a noun in the way the Respondent has done with ''union-free,'' he or she invariably intends to convey a far more specific rhetorical ''statement'': Central to the speaker's or writer's intention in such formulations is to make a decidedly *negative* statement about the word preceding ''free.'' (E.g., ''accident-free,'' ''drug-free,'' ''cancer-free,'' ''nuclear-free.'') And one ''message'' inevitably conveyed by such ''[X]-free'' formulations is that to be ''[X]-free'' is to be ''liberated'' or ''protected'' from or ''cured'' of whatever ''X'' may happen to be. But these ''messages'' take on an even more exhortative—as distinguished from merely ''informational''—character where the exercise of will, or ''choice,'' can be brought to bear to achieve a state of ''freedom'' from whatever ''X'' may happen to be. In such cases, the rhetorical message is that ''X'' is a status one *should* rid oneself of, or abandon or avoid, and that ''[X]-free'' is a status one *should* strive for, or seek to maintain.

Precisely because of the unique and distinct rhetorical ''messages'' inevitably conveyed by such ''[X]-free'' formulations, I can only conclude that, in adopting the expression ''union-free,'' the Respondent's rhetorical intention was to ''influence,'' or ''persuade,'' or exhort employees to *remain* ''union-free'' if they were lucky enough to enjoy that status presently, or to *become* ''union-free,'' if it were their current misfortune to be ''union-enslaved.''[50] Thus, the Respondent clearly conveyed not merely a ''union-neutral'' ''message,'' but a decidedly ''union-hostile'' one, one which would inevitably convey to represented and unrepresented employees alike that becoming or remaining nonunion was what the Respondent was encouraging them to achieve, and what it was willing to pay bonuses for, under the new program.[51]

Considering all the foregoing, I conclude that the Respondent acted from unlawfully discriminatory motives when it devised and introduced the 1990 program, and, because of that, its actions do not qualify for *Shell Oil–B. F. Goodrich* insulation. Rather, it violated Section 8(a)(3) by unilaterally and peremptorily excluding union-represented Tyrone and El Paso workers from the reach of the new program.[52]

---

[49] Webster's New World Dictionary of the American Language, College Edition, provides the following principal definition of ''rhetoric'' (emphasis added):

> 1. The art or science of using words effectively in speaking or writing, so as *to influence or persuade* . . . .

[50] I do not suggest that an employer violates the law simply by using the expression ''union-free'' in a context (such as during a preelection campaign) where the employer is free to propagandize, or ''exhort'' or ''influence'' employees by speech alone to become or remain unrepresented by a union. But where, as here, ''union-free'' was introduced as the eligibility- and exclusion-defining criterion for an employee's receipt of a ''benefit,'' it must necessarily be seen as a ''statement[ ] encouraging the employees to abandon collective representation in order to secure the benefit,'' providing ''*clear evidence* of unlawful 8(a)(3) motivation,'' within the meaning of *B. F. Goodrich*, supra.

[51] Certainly, if an employer were to announce a ''quarterly program'' of ''accident-free appreciation payments,'' employees exposed to that announcement could be forgiven if they were to draw the conclusions (a) that the employer wished to *eliminate* accidents from the workplace, and (b) that there was money in it for them if they could maintain or achieve ''accident-free'' status.

[52] It is not easy to make an 8(a)(3) violation of this type amenable to a *Wright Line* analysis (251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982)). It would be definitionally absurd in the circumstances for the Respondent to carry its *Wright Line* burden of ''demonstrating'' that it would have

B. *The 8(a)(5) Unilateral Change*

1. Principles of general application

There is no disagreement about the basic principles: The Act treats as ''mandatory bargaining subjects'' any aspect of the employer-employee relationship which affects ''wages, hours of work, or other terms and conditions of employment.''[53] Second, as *Katz*[54] teaches, an employer may not change union-represented employees' existing terms and conditions of employment on a unilateral basis, but must ''maintain the status quo'' pending notification to, and, on request, bargaining with, the union representative about any such proposed changes; indeed the employer must refrain from implementing any such changes until the union has either waived the right to bargain or the employer and union have bargained in good faith to agreement or impasse about such changes.[55]

Katz principles continue to dominate this legal arena. In *Indiana & Michigan Electric Co*., 284 NLRB 53 (1987), the main issue revisited by the Board was whether, on expiration of a labor agreement, an employer must continue arbitrating postexpiration grievances not themselves construable as ''arising under'' the expired agreement.[56] That question, of course, is not the one we are presented with. But it is pertinent to this case that the *Indiana & Michigan Electric* majority reaffirmed the sweeping reach of the *Katz* doctrine, most notably, when it spoke of,

> [t]he *few exceptions* to the general rule that an employer must bargain about changes in terms and conditions of employment *regardless of how those terms came to be initially established.*[57]

And the Board has said more recently, referring to situations closer to the one presented here, that,

> [T]he same [*Katz*] bargaining obligation applies whether the issue involved is the employer's unilateral granting of merit increases *or* its unilateral *discontinuance* of them.[58]

Finally, and even more directly apposite to our circumstances, the Board said in *Central Maine Morning Sentinel*, 295 NLRB 376 (1989) (emphasis added):

> we note that while the *amount* of the general increase is *discretionary* on the part of the Respondent, *a subsequent decision to grant* that year's increase *to some* employees *in the affected class and at the same time withhold it from others similarly situated is a clear departure from an established practice ''to which the employer has already committed himself.''* [Citing *Katz*, 369 U.S. at 746; footnote omitted.][59]

Clearly, in the foregoing there is enough law to find a violation in the Respondent's unilateral discontinuance of a practice of including union-represented employees in appreciation payments, provided only that the historical ''payments'' associated with that ''practice'' were, indeed, an established emolument of the ''wages'' or other ''terms and conditions of employment'' of employees in the union-represented units and were not mere ''gifts,'' about which there is no duty to bargain. But whether these 1985–1989 payments were ''wages,'' rather than ''gifts,'' is the disputed threshold question, to which I now turn.

2. Were the 1985–1989 appreciation payments part of the established ''wages,'' or other ''terms and conditions'' of employment in the bargaining units represented by the Unions?

In addressing this question, I begin by noting again that the Respondent admittedly went out of its way to impose a quality of ''irregularity'' or ''unpredictability'' into its 1985–1989 ''program'' of appreciation payments, all admittedly designed to avoid creating ''expectations'' on the recipient employees' part, and, relatedly, to avoid any union claim that the matter of appreciation payments was a bargainable subject, and thereby to retain ''full discretion'' in the implementing of such a ''program.'' And, indeed, it is largely on the basis of these calculated irregularities in the timing of and computational formula used by the Respondent during the 1985–1989 period that the Respondent now claims that the 1985–1989 payments amounted to merely a series of discretionary ''gifts,'' not ''wages.'' In thus arguing, the Respondent cites the Ninth Circuit's summary of the law in this area in *Nello Pistoresi & Sons, Inc*., 500 F.2d 399, 400 (1974) (emphasis added):

> Bonuses such as the ones here at issue are considered wages if they are of such a fixed nature and have been paid over a sufficient length of time to have become a *reasonable expectation* of the employees and, therefore, part of their anticipated remuneration.

It was the ''unpredictability'' and the ''discretionary'' character of the payments made under the 1985–1989 ''program'' which the Respondent now cites as the principle factor negating any supposition that the employees might have ''expectations'' that such payments would continue to be made. But it must be noted that the existence of ''discretionary'' elements in a bonus payment program will not alone render a bonus payment a ''gift.'' *Central Maine Morning Sentinel*, supra. See also *Eastern Maine Medical Center v. NLRB*, 658 F.2d 1 (lst Cir. 1981):

---

excluded union-represented employees from coverage under the new program even absent the fact that they were union-represented. In any case, my findings above and below about the Respondent's past ''practice'' of making union-blind appreciation payments make it doubly difficult for the Respondent to contend that, even absent union-hostile considerations, it would have excluded the union-represented employees from the new appreciation payment program.

[53] *NLRB v. Borg-Warner Corp*., 356 U.S. 342 (1958).

[54] *NLRB v. Katz*, 369 U.S. 736 (1961).

[55] See generally *Intersystems Design Corp*., 278 NLRB 759 (1986), and cases cited.

[56] 284 NLRB at 55, 60.

[57] 284 NLRB at 54; emphasis added. There, the majority acknowledged only two such exceptional situations in the precedents, (a) for union-security and dues-checkoff arrangements after a contract's expiration, and (b) for postexpiration arbitration of grievances.

[58] *Daily News of Los Angeles*, 304 NLRB 511 (1991) (emphasis added), citing *Oneita Knitting Mills*, 205 NLRB 500 fn. 1 (1973).

[59] Supra; emphasis added.

> Indefiniteness as to amount [of a wage increase] and a flavor of discretion do not under these circumstances prevent the undertaking from becoming part of the conditions of employment.

And see *Central Maine Morning Sentinel*, 295 NLRB 376 (1989), characterized by the Board in *Daily News of Los Angeles*, supra, as holding that ''the employer unlawfully witheld [sic] a wage increase from unit employees where the granting of the increase had become an established practice, *although the amount of the increase was discretionary*.''[60]

It is usually the case with corporate ''programs,'' even those which seek to avoid in their implementation any attributes of ''regularity'' or ''predictability,'' that certain ''patterns'' will tend to reveal themselves over time, and this will inevitably raise ''expectations'' on the part of the employees who have seen these ''patterns'' emerge. Such patterns are not difficult to discern in the 1985–1989 history. I have already recorded the ones I found most relevant to the 8(a)(3) issues; I incorporate them again here by reference. In addition, I think the following facts about appreciation payment ''practices'' point clearly away from the notion that the 1985–1989 payments were ''gifts,'' and strongly suggest instead that they had become part of the established ''wages'' of the employees in the union-represented units.

(a) The multiplier used to determine each bonus payment was derived from either the employee's current pay rate (three of the payments) or to the hours they had worked, including vacation time, during a previous fixed period (the other four payments). In short, the amount of the payments which the Respondent would now characterize as ''gifts'' was a function either of the work they had recently performed, or of the regular wages they were currently earning. This augurs against a finding that these payments were ''gifts.'' See, e.g., *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210, 213 (8th Cir. 1965):

> but if the gifts or bonuses are *so tied to the remuneration which emloyees receive for their work* that they were, in fact part of it, they are *in reality wages and within the statute*.

See also, e.g., *Freedom WLNE-TV*, 278 NLRB 1293, 1296–1297 (1986), where the Board affirmed Judge Zankel, who had found it important to the conclusion that certain cash ''Christmas bonuses'' were ''wages,'' not ''gifts,'' that,

> The . . . bonus was made pursuant to a formula inextricably tied to employees' wages and seniority.

(b) Appropriate Federal and state tax amounts were deducted from each of the payments. ''Gifts'' are not taxable to the recipient; ''wages'' clearly are. The Respondent had apparently decided for tax purposes, at least, that the 1985–1989 payments were not ''gifts.''

(c) When it suited the Respondent's purpose, the Respondent had no difficulty in seeking to portray the 1985–1989 bonus payments as part of the overall ''wage package'' that *all* day's-pay employees worked under, including the union-represented groups. Thus, in Judd's March 26, 1990 letter, supra, Judd unmistakably linked the 1985–1989 payments to ''wages'' when he said (emphasis added):

> Phelps Dodge is proud of the fact that we were the first company in the copper industry to provide our employees with appreciation payments. These payments have allowed us to share our good fortune during periods of high copper prices, while maintaining our competitiveness during periods of low copper prices. . . . We *continue* to believe it is important that Phelps Dodge provide you with a competitive *wage and benefit package*. . . . All employees have welcomed the past appreciation payments, although there has been a concern that these payments have been difficult to predict.

(d) Similarly, during 1988 contract bargaining between the Respondent and the Electrical Workers for the El Paso Rod Mill, it suited the Respondent's purpose to portray the appreciation payments as part of the ''compensation'' package that the Rod Mill unit employees enjoyed. Thus, the Respondent's Pierce had raised these payments as a shield to deflect union demands for an increase in the ''base rates.''[61] Also, Pierce had made what I can only view as an implied promise to *continue to confer such payments* on employees in the El Paso Rod Mill unit when he deflected a separate union request to incorporate a ''profit''-linked bonus program into the new labor agreement with the peroration quoted earlier, ending with the statements that ''to include that in the agreement would be too difficult and . . . the [union] committee and the employees would have to trust the company . . . because they had paid them in the past.''

(e) Union-represented employees at Tyrone and El Paso always received a payment to the same extent that the unrepresented day's-pay employees at the same locations were included, and always according to the same formula. This 5-year pattern would inevitably lead union-represented day's-pay employees to ''expect'' that, no matter how unpredictable might be the timing or precise formula used in making the payment, they would at least share in any future payment the Respondent might choose to confer to the same extent their unrepresented day's-pay coworkers at the same location were to receive one.

(f) Indeed, the Respondent's officials recognized that such an ''expectation'' had long since been implanted in the minds of union-represented workers when, in June 1989, it opted in favor of including the Tyrone unit employees, rather than reap the harvest of ''anger'' on their part that would surely follow an unprecedented exclusion of them from such payments. Given this recognition in 1989, the Respondent cannot seriously maintain now that its 1985–1989 program raised no ''reasonable expectations'' in the minds of represented employees that they would continue to share in whatever appreciation payments the Respondent might make.

[60] 304 NLRB 511; emphasis added.

[61] Pierce had told the Electrical Workers,

> You're out of your damn minds. There is not going to be any increase to the base rates. We have been providing bonuses over . . . the past years. Apparently those bonuses have no meaning to your members whatsoever.

3. Did the 1990 program amount to a ''change'' in historical appreciation payment ''practice?'' Or was the 1990 program ''wholly unrelated'' to that historical practice?

I have anticipated this question in many of my previous findings. I have found that the Respondent's own written admissions clearly establish a close kinship between the two programs, indeed, that the Respondent found it useful to its purposes in announcing the 1990 program to portray the 1985–1989 payment program as the father of the new program. I have also found that the facial similarities between the former program and the latter one alone betray that paternity. And, in making that particular finding, I rely principally on the following set of considerations.

The seven multifacility payments in 1985–1989 were portrayed to employees as being ''profit''-linked, under circumstances where Judd admits that ''copper price'' is one of the two key variables affecting company profitability (the other, according to Judd, is ''productivity,'' more precisely, ''production costs'').[62] And it is clear from Judd's testimony that ''copper price''—not ''productivity''—had the ''predominate . . . impact'' in the Respondent's ''judgements'' to confer *all* of the (five) appreciation payments made by the Company in and after ''mid-'87.'' Thus, the seven multifacility payments amounted to ''profit-sharing bonuses,'' and the five bonuses paid after ''mid-'87'' were directly based on ''copper price'' as the key factor. And therefore it is not hard to see that the ''copper price'' formula used for the 1990 program was merely an extension or refinement of the considerations and formulas underlying the majority of the 1985–1989 payments, indeed the ones which underlay *all* of the payments made in and after ''mid-'87.''

Accordingly, the 1990 program of payments was quite obviously closely ''related'' in character, theme, and formula to the payments made previously on a union-blind basis. And, in the circumstances, the 1990 program involved a ''change'' from the 1985–1989 ''program'' in the very sense claimed by the General Counsel—in its *exclusion* of traditionally *included* groups, i.e., union-represented employees. In the circumstances, the Respondent clearly owed a *Katz* duty to notify and bargain with the Unions before withholding from the unit employees they represented a substantial emolument of ''compensation'' which they had traditionally received.

4. The Respondent's ''waiver'' defenses

I noted in my initial statement that the Respondent pleaded no affirmative defenses in its answers. In addition, the Respondent's counsel declined to make an opening statement at the trial's outset, and did so again after the prosecuting parties had rested their cases-in-chief, saying in the last instance that there was no need for such a statement because, ''Your Honor is fully apprised of what the positions of the parties will be.'' At this point, Attorney Hollis, for the Electrical Workers, argued that the Respondent should be required to articulate its defenses, ''to avoid any kind of surprise or that sort of thing.'' Responding to this, I declined to require the Respondent to make a comprehensive statement of its defenses, but I cautioned the Respondent that,

> If I find that an argument is raised on brief based on some sliver of evidence in the record which would lead [me] to believe that the issue wasn't litigated due to lack of notice, I'm liable to dismiss that argument on that ground alone. I will need to see full litigation of any legal contention and I'm taking Respondent's word that he believes there will have been on that point.

I then hazarded my own summary of the Respondent's apparent legal position—in substance that the past history of appreciation payments made by the Respondent never created a duty to bargain with any of the Unions over the subject of such payments; that it was not ''inherently unlawful for the Respondent to have promulgated'' the 1990 program; and that its announcement and implementation of the new program had no ''inherently discriminatory'' impact, nor did it ''inherently tend to interfere with employees' rights under Section 7.''[63] I invited the Respondent to correct me if I was wrong. The Respondent's counsel adopted those summaries and further affirmed that in thus summarizing its position, I had not ''missed anything significant.''[64]

On brief, the Respondent now interposes two hitherto-unannounced ''union-waiver'' defenses. Both are vulnerable to dismissal for the reasons I noted in my cautionary remarks to the Respondent's counsel quoted above, but I shall identify these defenses more particularly before disposing of them. The Respondent argues as to the Electrical Workers:

> Assuming, arguendo, that a bargaining obligation [over the question of the El Paso unit employees' inclusion in payments made to their nonunion counterparts under the 1990 Program] did exist, the El Paso Rod Mill Union waived any such obligation.

The Respondent here claims, in substance, that the Electrical Workers committed such a ''waiver'' when ''it agreed to the inclusion of an integration [or 'zipper'] clause in the current [i.e., 1988–1991] collective bargaining agreement.'' Separately, the Respondent now contends that both the Electrical Workers and the PACT Union committed a different form of ''waiver'' when, after learning of the Respondent's implementation of the 1990 program, they failed to request bargaining over the Respondent's exclusion from the program of the employees they represented.[65]

[62] See generally Tr. 330–337.

[63] Tr. 379:3–381:25.

[64] Tr. 381:25–382:7.

[65] So far as I can tell, the Respondent does *not* claim that any of the Unions waived relevant bargaining rights concerning the Respondent's implementation of the 1990 program simply because they had previously *acquiesced* in the Respondent's 1985–1989 history of unilaterally conferring appreciation payments. Such a claim would be unavailing in the circumstances. See, e.g., *Bath Iron Works Corp.*, 302 NLRB 898 (1991), where the Board reaffirmed that,

> The mere fact that a union has previously acquies[c]ed in an employer's unilateral implementation of plant rules does not, however, mean that the employer is free thereafter to implement different plant rules or significant and material changes in existing plant rules without giving the union notice and an opportunity to bargain. ''A union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time.'' [Quoting *Owens-Corning Fiberglas Corp.*, 282 NLRB 609 (1987); other citations omitted.]

Continued

D. *Alleged ''zipper clause'' waiver by Electrical Workers*

The Respondent claims waiver by the Electrical Workers based on the existence of an ''integration'' clause in the 1988–1991 El Paso Rod Mill contract.[66] In these aggravated circumstances,[67] the defense deserves summary dismissal. In any case, I find that the parties did not in any meaningful way litigate the relevant particulars; they certainly did not focus litigation on the bargaining history insofar as it related to the inclusion of that clause in the agreement. Their failure to litigate on this point is not surprising; the Respondent never raised waiver as a defense, much less did it allege a waiver tracing to the parties' inclusion of the purported ''zipper'' clause in their 1988–1991 agreement. The Respondent's failure to plead waiver as an affirmative defense or to raise it during the merits trial, or to introduce evidence of the ''bargaining history surrounding this ['zipper'] provision or the parties' interpretation of the provision,'' amount, in the aggregate, to a waiver of its right to claim waiver. *European Parts Exchange*, 270 NLRB 1244 fn. 1 (1984).

Alternatively, on the merits, I would find that the Respondent did not establish waiver simply by leaving us with a record showing that a rather generalized form of ''integration'' clause appears in the 1988–1991 agreement and that, during 1988 bargaining, the Electrical Workers had once asked, only to be immediately rebuffed, if the Respondent ''would be willing to include something in the agreement'' relating to the ''periodic bonuses'' which the Respondent's Pierce had already raised as a shield against union requests for an increase in ''base rates.'' These circumstances do not come close to establishing that the Electrical Workers had ''fully discussed'' or ''consciously explored,'' much less ''consciously yielded,'' or ''clearly and unmistakably waived its interest in the matter.''[68] Specifically, this spare record hardly shows that the Electrical Workers consciously ceded to the Respondent during the life of the contract the right to unilaterally determine whether employees in the Rod Mill unit would continue to be included in future appreciation payments extended to their unrepresented coworkers.[69]

The only remaining question is,

> *Did all the Unions Waive the Right to Bargain about Implementing the New Program by Failing to Request the Same After the Respondent Announced It?*

The record does not affirmatively show that any of the Unions sought to bargain with the Respondent after the Respondent had unilaterally announced and implemented the new program. In this regard, I presume that the Unions did, indeed, receive ''notice'' of the new program at some point, for they eventually filed unfair labor practice charges about it. Moreover, I might even safely assume, as the Respondent does, that ''[g]iven the realities of the workplace, union representatives were surely aware of the announcement shortly after it was made on March 26, 1990.''[70] But I find under all the circumstances that the Respondent made it essentially a futility for the Unions to seek to bargain, post facto, over the Respondent's unilateral actions.

In this regard, I note that the Respondent pointedly failed to give the Unions advance notice of its actions; thus, it had already presented the Unions with a fait accompli and thereby prevented exactly the kind of good-faith bargaining *in advance* contemplated by the statute and the construing authorities.[71] Moreover, in the interest of retaining ''full discretion,'' the Respondent had always resisted as a matter of policy any bargaining with unions over the subject of ''appreciation payment'' matters; it had claimed, in the one instance when a union had tried to raise the subject at the bargaining table, that the Electrical Workers would simply have to

---

See also *NLRB v. Miller Brewing Co.*, 408 F.2d 12, 15 (9th Cir. 1969):

> Each time the bargainable incident occurs—each time new rules are issued—[the] Union has the election of requesting negotiations or not.

[66] I will not burden this decision by quoting the lengthy text of the clause in question. It is generalized in its expression. It in no way indicates on its face that, by agreeing to this clause, the Electrical Workers were ceding to the Respondent during the term of the contract the right unilaterally to vary from established past practice respecting appreciation payments; much less does it establish that the parties contemplated that, under this clause, the Respondent might *withhold* from Rod Mill unit employees any future appreciation payments it might choose to confer on their unrepresented counterparts at the Rod Mill.

[67] The Respondent did not merely fail to plead this alleged waiver in its answer, where it arguably should have (Fed.R.Civ.P. 12(b)(6)), but it pointedly avoided specific opportunities to bring this defense to light at many intervals before the record closed, especially when its counsel declined my specific invitation to identify any defense that might require more specific litigation in order to be ''fully litigated.'' Particularly at the latter juncture, when the issue of sandbagging—and its consequences—was foremost in the discussion, counsel owed greater candor if it wished to raise and preserve this particular defense. Surely, the defense was not implicit in what I had surmised out loud, which surmises, as counsel affirmed, did not differ or vary in any ''significant'' way from the Respondent's own ''position.''

[68] *Reece Corp.*, 294 NLRB 448 (1989), adapting and quoting from *Park Ohio Industries v. NLRB*, 702 F.2d 624, 628 (6th Cir. 1983).

See also, e.g., *Angelus Block Co.*, 250 NLRB 868, 877 (1980); *GTE Automatic*, 261 NLRB 1491, 1492 (1982).

[69] The Respondent entirely fails to persuade me in its attempt to equate the facts in this case to those presented in *Columbus & Southern Ohio Electric Co.*, 270 NLRB 686 (1984). That case presented a differently worded and more particularized zipper clause than the one in the 1988–1991 agreement; more important, it involved a closely litigated bargaining history, which disclosed the specific context in which the ''zipper'' clause at issue had emerged, and had been separately challenged unsuccessfully by the union as an 8(a)(5) violation before the union acquiesced in the inclusion of the clause in the new agreement. Moreover, the union had specifically acknowledged in an administrative appeal associated with its earlier unfair labor practice charge, that the ''zipper'' clause in question was so broad as to bar future bargaining over even not specifically mentioned ''practices.'' And this was specifically invoked by the majority as one of the ''factors'' which ''constitute[d] evidence that the Union was fully aware that all previous agreements were subject to the zipper clause.'' 270 NLRB at 687 fn. 3.

[70] Certainly, given these same ''realities,'' I would have no hesitation in finding that union-represented employees must have learned on or shortly after March 26, 1990, that their ''union-free'' counterparts were about to receive a 6-month retroactive appreciation payments which they would not share in, and that their ''union-free'' counterparts would continue to receive such bonuses every 3 months thereafter, under a new program designed exclusively for those occupying ''union-free'' status.

[71] E.g., *Intersystems Design Corp.*, 278 NLRB 759–760 (1986), and authorities cited.

''trust the Company'' in such matters. In addition, the Respondent expressly declared that the quarterly payment program would be limited to ''union-free'' employees. Such preemptive declarations do not invite bargaining, they preclude it;[72] they carry no suggestion that the employer will maintain the status quo (in this case by offering to continue to confer appreciation payments under the new program to union-represented and - unrepresented groups) for a reasonable time to permit bargaining before any change might be implemented. Moreover, in their testimony, both Judd and Marcus suggested that the Respondent would have been willing to bargain over the inclusion of represented employees in payments being made under the new program *only when their respective labor agreements expired*, in the context of bargaining for a successor agreement. Thus, these authoritative company witnesses have virtually admitted that, had the Unions sought to bargain at the time the respondent announced the new program, the Respondent would have told them to put any such notion on hold, until such time as the employees they represented were no longer bound to a current labor agreement.

I thus find no waiver of rights to bargain by the Unions where to have demanded bargaining with the Respondent would have been a futility on their part.[73] And, consistent with earlier discussion, I conclude as a matter of law that when the Respondent failed to include union-represented employees at Tyrone and El Paso in payments made under the new program, the Respondent effected a unilateral change in the terms and conditions of employment of employees in the Tyrone and El Paso units, and thereby failed and refused to bargain in good faith with the Unions, in violation of Section 8(a)(5) and (1) of the Act.

THE REMEDY

My recommended Order contemplates that Respondent shall cease and desist from taking all unlawful action found. Affirmatively, it provides that the Respondent shall restore the status quo ante its unlawful actions by making whole all employees in the Tyrone and El Paso bargaining units in amounts equal to those already paid to ''union-free employees under the new program since its inauguration, with interest.[74] It further contemplates that the Respondent shall continue to confer such payments on Tyrone and El Paso unit employees unless and until, for lawful reasons, the Respondent might wish to make changes, and, in such event, unless and until the Respondent shall have discharged all collective-bargaining obligations it may then owe to the Unions, or any of them, concerning any such proposed changes. Finally, because the Respondent's mining companywide announcement of the 1990 ''Union-Free'' program has been found to have had an inherent tendency to interfere with the rights of all the Respondent's day's-pay employees and to ''discourage'' all such employees from becoming or remaining union members, my recommended Order contemplates that the Respondent shall post an appropriate notice to employees at all its mining company facilities where it employs day's-pay employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[75]

ORDER

The Respondent, Phelps Dodge Corporation, El Paso, Texas, and Tyrone, New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that they must be ''union-free'' in order to receive quarterly appreciation payments.

(b) Discriminatorily withholding appreciation payments from employees in the El Paso Rod Mill and Tyrone Mine bargaining units which the Respondent has conferred and continues to confer to unrepresented employees under its 1990 quarterly appreciation payment program.

(c) Unilaterally changing the terms and conditions of the employees in the Tyrone and El Paso bargaining units by failing to include employees in those units in appreciation payments being conferred to unrepresented employees under the 1990 program.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make employees in the El Paso and Tyrone bargaining units whole, with interest, for its discriminatory and unilateral withholding from them of payments made under the 1990 program, starting from the point when that program was inaugurated and until such time as the Respondent shall have discharged all collective-bargaining obligations to the Unions about any nondiscriminatorily motivated changes which the Respondent may propose to make concerning appreciation payments affecting employees in those units.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back payments and interest due under the terms of this Order.

(c) Post at all its copper facilities and operations under the jurisdiction of the Phelps Dodge Mining Company where day's-pay employees work copies of the attached notice

---

[72] *Ciba-Geigy Pharmaceuticals*, 264 NLRB 1013, 1017 (1982), stating,

> However, if the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a fait accompli.

[73] The Respondent's cases are distinguishable. *WPIX, Inc*., 299 NLRB 525 (1990), unlike this case, involved a unions *preimplementation* notice of an *increase* in the mileage reimbursement rates which the employer would pay to employees represented by the union, followed by that union's failure, before implementation, to seek to bargain. *Ventura County Star Free Press*, 279 NLRB 412 (1986), involved a ''complex factual matrix'' (id. at 420) which, again, included *preimplementation notice* to the union (at a bargaining session) that the employer would no longer confer ''step raises.'' Ibid.

[74] Interest is to be figured as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[75] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

marked ''Appendix.''[76] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[76] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell our employees that they must be ''union free'' to receive appreciation payments being paid under our 1990 program.

WE WILL NOT discriminate against our employees who are represented by the Electrical Workers or the PACT Union or by any other labor organization by withholding appreciation payments from them which we are paying to our unrepresented employees under the new program.

WE WILL NOT unilaterally change established conditions of employment in the bargaining units represented by the Electrical Workers, or the PACT Union, or by any other labor organization, such as by failing to include such employees in appreciation payments made under the 1990 program to their unrepresented coworkers at the same locations.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole, with interest, all of our day's-pay employees working in union-represented bargaining units at the El Paso Rod Mill and the Tyrone Mine, by paying them, with interest, the amounts we have paid to unrepresented day's-pay employees under the 1990 program, and WE WILL continue to include those unit employees in such payments unless and until we have a lawful reason for changing that practice, and unless and until we fulfill our duties to notify and bargain collectively in good faith with the Electrical Workers and/or the PACT Union over any such desired changes.

PHELPS DODGE CORPORATION